

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 MARIA OLIVEREZ,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL SECURITY,

11 Defendant.

No. 4:16-cv-05120-EFS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

12
13 Before the Court, without oral argument, are cross-summary-
14 judgment motions. ECF Nos. 13, 26. Plaintiff Maria Oliverrez appeals
15 the Administrative Law Judge's ("ALJ") denial of benefits. ECF No. 13.
16 The Commissioner of Social Security ("Commissioner") asks the Court to
17 affirm the ALJ's decision that Ms. Oliverrez is not disabled and is
18 capable of performing her past relevant work as a realtor and retail
19 sales clerk. ECF No. 26 at 1-3. After reviewing the record and
20 relevant authority, the Court is fully informed. For the reasons set
21 forth below, the Court remands for further proceedings.

22 **I. STATEMENT OF FACTS¹**

23 Plaintiff Maria Oliverrez was born on August 15, 1955.
24 Administrative Record, ECF No. 9, ("AR") 185. Her highest formal

25 ¹ The facts are only briefly summarized. Detailed facts are contained in the
26 administrative hearing transcript, the ALJ's decision, and the parties' briefs.

1 education was at the tenth grade, although she has attempted to earn a
2 GED and has completed a professional real estate course. AR 61. AR
3 56, 67. She stands 4'9" tall and weighs approximately 190 lbs. AR 421.

4 Ms. Oliverez has been diagnosed with a number of physical
5 conditions, including hypertension, type II diabetes mellitus,
6 hyperlipidemia, rheumatoid arthritis, severe osteoarthritis,
7 depression and anxiety, hypercholesterolemia, hypokalemia, tobacco use
8 disorder, and morbid obesity. See AR 298, 318, 322, 330, 367. She
9 experiences regular chest, epigastric, knee, shoulder, and hand pain,
10 See AR 52-57, 63-66, 364-72, 432-33, 441-50, and takes regular
11 medication to manage her pain and other symptoms. See AR 59-60, 63-66,
12 70, 364-72. Although her knee pain has improved since she received two
13 total knee replacements in December 2012 and June 2013, AR 367, 525,
14 Ms. Oliverez still claims to experience significant pain and swelling
15 after more than twenty minutes of walking or standing. AR 53-55.

16 Ms. Oliverez lives with her son and spends her days mostly at
17 home, where she sweeps the house, does the dishes and laundry, and
18 cooks meals. AR 55-56. In her free time, she enjoys reading and
19 crocheting. AR 66-67. She has a significant work history: as a realtor
20 (DOT Code: 354.377-014) from March 2002 to July 2005, a care provider
21 (DOT Code: 250.357-018) from June 2007 to January 2010 and September
22 2010 to August 2011, and as a retail sales clerk (DOT Code: 211.462-
23 014) from May 1994 to August 2008. AR 57, 185-86. She has not been
24 employed full-time since 2011. AR 213.

25 //

26 /

1 **II. PROCEDURAL HISTORY AND ALJ FINDINGS**

2 On April 30, 2012, Ms. Oliveriez filed an application for
3 disability insurance benefits and on July 23, 2012, filed a related
4 application for supplemental security income. AR 19. In both claims,
5 she alleged a disability onset date of April 4, 2012. AR 19. Ms.
6 Oliveriez's claims were denied initially and upon reconsideration.
7 AR 19. She subsequently requested a hearing before an ALJ. AR 19. The
8 hearing occurred before ALJ R.J. Payne on January 8, 2015, in Spokane,
9 WA. AR 19. Ms. Oliveriez and counsel appeared by video in Kennewick,
10 WA, and medical expert H.C. Alexander III, M.D. appeared and testified
11 by telephone. AR 19, 36-52.

12 On February 12, 2015, the ALJ issued a decision denying Ms.
13 Oliveriez's claim. AR 26-27. In his decision, he determined Ms.
14 Oliveriez has the severe impairments of diabetes mellitus, obesity,
15 hypertension, and degenerative joint disease with bilateral total knee
16 replacement. AR 21-22. The ALJ proceeded to find that Ms. Oliveriez's
17 impairments do not meet or medically equal the severity of any listed
18 impairments. AR 22. Despite her impairments, the ALJ ultimately found
19 Ms. Oliveriez has the residual functional capacity ("RFC") to perform
20 light work as defined in 20 CFR §§ 404.1567(b) and 416.967(b) with no
21 significant limitations. AR 22. Based on this assessment, the ALJ
22 found Ms. Oliveriez is capable of performing her past relevant work as
23 a realtor and retail sales clerk, which "does not require the
24 performance of work-related activities precluded by the claimant's
25 residual functional capacity." AR 26 (citations omitted). As a result,

1 the ALJ concluded Ms. Oliverez is not disabled under sections 216(i)
2 and 223(d) of the Social Security Act. AR 26.

3 The Appeals Council denied Ms. Oliverez's request for review,
4 AR 1-3, making the ALJ's decision final agency action for purposes of
5 judicial review. 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481,
6 422.210. Ms. Oliverez filed this lawsuit on September 6, 2016,
7 appealing the ALJ's decision. ECF No. 1. The parties then filed the
8 present summary-judgment motions. ECF Nos. 13 & 26.

9 **III. STANDARD OF REVIEW**

10 A district court's review of a Commissioner's final decision is
11 governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
12 limited: the Commissioner's decision will be disturbed "only if it is
13 not supported by substantial evidence or is based on legal error."
14 *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial
15 evidence" means relevant evidence that "a reasonable mind might accept
16 as adequate to support a conclusion." *Id.* at 1159 (quotation and
17 citation omitted). Stated differently, substantial evidence equates to
18 "more than a mere scintilla but less than a preponderance." *Id.*
19 (quotation and citation omitted). In determining whether this standard
20 has been satisfied, a reviewing court must consider the entire record
21 as a whole rather than searching for supporting evidence in isolation.
22 *Id.*

23 In reviewing a denial of benefits, a district court may not
24 substitute its judgment for that of the Commissioner. If the evidence
25 in the record "is susceptible to more than one rational
26 interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record." *Molina v.*
2 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court
3 "may not reverse an ALJ's decision on account of an error that is
4 harmless." *Id.* An error is harmless "where it is inconsequential to
5 the [ALJ's] ultimate nondisability determination." *Id.* at 1115
6 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was
8 harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

9 **IV. DISABILITY DETERMINATION**

10 A claimant is considered "disabled" for the purposes of the
11 Social Security Act if two conditions are satisfied. First, the
12 claimant must be "unable to engage in any substantial gainful
13 activity by reason of any medically determinable physical or mental
14 impairment which can be expected to result in death or which has
15 lasted or can be expected to last for a continuous period of not less
16 than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the
17 claimant's impairment must be of such severity that she "is not only
18 unable to do [her] previous work but cannot, considering [her] age,
19 education, and work experience, engage in any other kind of
20 substantial gainful work which exists in the national economy." *Id.*
21 § 1382c(a)(3)(B). The decision-maker uses a five-step sequential
22 evaluation process to determine whether a claimant is disabled. 20
23 C.F.R. §§ 404.1520, 416.920.

24 Step one assesses whether the claimant is currently engaged in a
25 substantial gainful activity. *Id.* § 416.920(a)(4)(i). If she is,
26

benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision-maker proceeds to step two.

Step two assesses whether the claimant has a medically severe impairment, or combination of impairments, which significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If she does not, the disability claim is denied. If she does, the evaluation proceeds to step three.

Step three compares the claimant's impairment to several recognized by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment does not, the evaluation proceeds to step four.

Step four assesses whether the impairment prevents the claimant from performing work she has performed in the past by determining the claimant's residual functional capacity. *Id.* §§ 404.1520(e), 416.920(e). If the claimant is able to perform her previous work, the claimant is not disabled. If the claimant cannot perform this work, the evaluation proceeds to step five.

Step five, the final step, assesses whether the claimant can perform other work in the national economy in view of the claimant's age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *see Bowen v. Yuckert*, 482 U.S. 137 (1987). If she can, the disability claim is denied. If she cannot, the claim is granted.

1 The burden of proof shifts during this analysis. The claimant
2 has the initial burden of establishing entitlement to disability
3 benefits under steps one through four. *Rhinehart v. Finch*, 438 F.2d
4 920, 921 (9th Cir. 1971). At step five, the burden shifts to the
5 Commissioner to show (1) the claimant can perform other substantial
6 gainful activity and (2) that a "significant number of jobs exist in
7 the national economy" which the claimant can perform. *Kail v. Heckler*,
8 722 F.2d 1496, 1498 (9th Cir. 1984).

9 **V. ANALYSIS**

10 Ms. Oliverrez contends the ALJ erred because he (1) improperly
11 found Ms. Oliverrez could return to past work; (2) improperly weighed
12 testimony evidence; and (3) discredited Ms. Oliverrez's testimony
13 without a specific, clear, and convincing reason. ECF No. 13. The
14 Court addresses each challenge to the ALJ's decision in turn.

15 **A. Past relevant work**

16 First, Ms. Oliverrez contends the ALJ committed reversible error
17 at step four by improperly finding she could return to past work as a
18 realtor and a retail sales clerk. ECF No. 13 at 5. The Commissioner
19 responds that Ms. Oliverrez, not the Commissioner, has the burden of
20 proving she can no longer perform her past relevant work and that the
21 ALJ had substantial evidence to find her capable of performing her
22 past relevant work ("PRW"). ECF No. 26 at 12.

23 To proceed past step four in the disability analysis outlined
24 above, the claimant has the burden to show she can no longer perform
25 her past relevant work "either as actually performed or as generally
26 performed in the national economy." *Carmickle v. Comm'r, Soc. Sec.*

1 Admin., 533 F.3d 1155, 1166 (9th Cir. 2008); 20 C.F.R. §§ 404.1520,
2 416.920. However, the ALJ retains a duty to make certain factual
3 findings to conclude the claimant is able to return to work: the ALJ
4 must make specific findings as to the claimant's (1) residual
5 functional capacity, (2) the physical and mental demands of the past
6 relevant work, and (3) the relationship of the residual functional
7 capacity to the past work. *Pinto v. Massanari*, 249 F.3d 840, 844-45
8 (9th Cir. 2001); Social Security Ruling ("SSR") 82-62.

9 To dismiss a claim at step four, the ALJ must find the claimant
10 can perform either (1) the *actual functional demands and job duties* of
11 a particular past relevant job (2) or the functional demands and job
12 duties of the occupation as *generally required* by employers throughout
13 the national economy. SSR 82-61 (emphasis added). The ALJ should first
14 consider past work as actually performed, and then as usually
15 performed. SSR 96-8P.

16 Here, the ALJ found Ms. Oliverez has a residual functional
17 capacity to perform light work as defined in 20 CFR §§ 404.1567(b) and
18 416.967(b) with no significant limitations. AR 22. However, the ALJ
19 did not make any clear findings regarding the actual demands of Ms.
20 Oliverez's past relevant work. See SSR 82-61. It is true that Ms.
21 Oliverez responded to questions from her attorney regarding some of
22 the actual physical demands of her past work at the hearing, for
23 example, that she was required to stand for eight to ten hours a day
24 as a retail clerk and lift heavy metal signs as a realtor. See AR 57-
25 59. But the ALJ made no mention of these statements in his opinion,
26 and there is no way of knowing whether he considered them. Indeed,

1 because the ALJ found the claimant's statements relating to her
2 subjective symptoms not entirely credible, he may have similarly
3 disregarded her statements about her past work, if he considered them
4 at all. See AR 23-24.

5 Nor did the ALJ make sufficiently specific findings regarding
6 the functional demands of Ms. Oliverrez's past relevant work as
7 generally required by employers throughout the national economy. See
8 SSR 82-61. He only noted that her work as a realtor and as a retail
9 sales clerk "required the ability to tolerate light exertion" and that
10 Washington Disability Determination Services ("DDS") had found she
11 could perform her past relevant work as a realtor. AR 26. Although the
12 Dictionary of Occupation Titles ("DOT") and related descriptions for
13 both jobs are present in the record, AR 104, 185, the ALJ made no
14 significant reference to them in his opinion, and there is no other
15 indication the ALJ considered them. Finally, the ALJ did not rely on
16 vocational expert testimony, as is common practice at step four of the
17 sequential analysis. 20 C.F.R. § 404.1560(b)(2), 416.960(b).

18 Because the ALJ did not make clear findings as to the actual
19 physical and mental demands of Ms. Oliverrez's past relevant work and
20 did not make sufficiently specific findings regarding the demands of
21 the work as "generally required by employers throughout the national
22 economy," the Court remands for the ALJ to make such findings. See SSR
23 82-61; *Morgan v. Colvin*, 622 F. App'x 648, 649 (9th Cir. 2015)
24 (remanding to the agency to make specific findings as to past relevant
25 work).

26 /

1 **B. Medical evidence**

2 Next, Ms. Oliveriez contends the ALJ committed reversible error
3 by improperly weighing the medical testimony of Drs. Alex Najera, Paul
4 Schwartz, H.C. Alexander III, and J.R. Saphir. ECF No. 13 at 7-16. The
5 Commissioner responds that the ALJ's interpretations of the medical
6 evidence were reasonable and that Ms. Oliveriez simply offers an
7 alternate interpretation of the medical evidence, which is
8 insufficient to overturn the ALJ's decision. ECF No. 26 at 9-11.

9 "In disability benefits cases, physicians may render medical,
10 clinical opinions, or they may render opinions on the ultimate issue
11 of disability – the claimant's ability to perform work." *Garrison v.*
12 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (quotation omitted). There
13 are three types of physicians: treating physicians, examining
14 physicians, and nonexamining physicians. *Lester v. Chater*, 81 F.3d
15 821, 830 (9th Cir. 1995). "As a general rule, more weight should be
16 given to the opinion of a treating source than to the opinion of
17 doctors who do not treat the claimant." *Id.* The ALJ must provide
18 "clear and convincing" reasons for rejecting the uncontradicted
19 opinion of an examining physician. *Id.*

20 If the opinion of a treating physician is contradicted by
21 another physician, the ALJ may not reject the opinion without
22 providing "specific and legitimate reasons" supported by "substantial
23 evidence" in the record. *Id.* "An ALJ can satisfy the 'substantial
24 evidence' requirement by setting out a detailed and thorough summary
25 of the facts and conflicting clinical evidence, stating his
26

1 interpretation thereof, and making findings." *Garrison*, 759 F.3d at
2 1012 (internal quotations omitted).

3 1. Dr. Alex Najera

4 The ALJ gave Dr. Najera's February 25, 2014 assessment of Ms.
5 Oliverez little weight. AR 25. Given the legitimacy of at least one of
6 the reasons given by the ALJ, the Court holds the ALJ did not err in
7 awarding Dr. Najera's assessment little weight.

8 First, the ALJ gave Dr. Najera's assessment little weight
9 because he "had only treated the claimant for a short time." AR 25.
10 Ms. Oliverez contends the ALJ "confusingly" misstated the nature of
11 her relationship with Dr. Najera. See ECF No. 13 at 7. She avers that
12 Dr. Najera has treated her since at least 2011 and is thus a treating
13 physician whose opinion should be afforded greater weight. ECF No. 13
14 at 8.

15 It is true that third-party medical records list Dr. Najera as
16 Ms. Oliverez's primary care physician in January of 2011. AR 424.
17 However, even if Dr. Najera was actively treating Ms. Oliverez in
18 January 2011, the record does not indicate she saw him again until he
19 evaluated her for state Department of Social and Health Services
20 ("DSHS) benefits on February 25, 2014, nearly two years after her
21 alleged onset date. See AR 428. Indeed, it would have been difficult
22 for Dr. Najera to treat Ms. Oliverez, considering she moved to
23 California in early 2012 and lived there until at least August of
24 2013. See AR 300, 520. Rather, the bulk of Ms. Oliverez's primary care
25 during the period surrounding her onset date was provided by Dr.
26 Nanette Chua of Red Bluff, CA, who referred her to orthopedic surgery.

1 See AR 288-92, 297, 300, 326-52 (detailing 10 appointments with Dr.
2 Chua between May and November 2012).

3 Accordingly, the ALJ did not err by giving Dr. Najera's opinion
4 less weight because of the short duration of his recent treatment
5 relationship with Ms. Oliverez. See *Orn v. Astrue*, 495 F.3d 625, 631
6 (9th Cir. 2007) (explaining the ALJ is entitled to weigh a treating
7 physician's opinion by a number of factors, including the "[l]ength of
8 the treatment relationship and the frequency of examination") (quoting
9 20 C.F.R. § 404.1527(c)(2)(i)).²

10 Even if the ALJ did err in discrediting Dr. Najera's testimony,
11 such an error would likely be harmless because it would be
12 inconsequential to the ALJ's ultimate nondisability determination. See
13 *Molina*, 674 F.3d at 1115. Supposing that Dr. Najera accurately
14 determined that Ms. Oliverez was limited to sedentary work for at
15 least six months, she would not necessarily be entitled to disability
16 benefits. See AR 23-24, 428; 42 U.S.C. § 1382c(a)(3)(A) ("an
17 individual shall be considered to be disabled . . . if he is unable to
18 engage in any substantial gainful activity . . . which has lasted or
19 can be expected to last for a continuous *period of not less than*
20 *twelve months*" (emphasis added)). Accordingly, the ALJ did not err in
21 discrediting Dr. Najera's testimony.

22 2. Dr. Paul Schwartz

23
24 ² The ALJ also gave Dr. Najera's assessment less weight because Ms. Oliverez
25 may have had an incentive to overstate her symptoms and because Dr. Najera
26 presumably applied state DSHS definitions of physical limitations. Because
the Court finds the ALJ asserted a specific and legitimate reason for
rejecting Dr. Najera's opinion - namely, the length of the treatment
relationship and the frequency of examination - any errors the ALJ may have
made regarding these other reasons were harmless.

1 The ALJ gave an little weight to assessment conducted by Dr.
2 Schwartz, Ms. Oliverrez's orthopedic surgeon and treating physician.
3 AR 24-25. Dr. Schwartz's assessment appears to conflict with the
4 opinions of non-examining physicians Drs. H.C. Alexander III, and J.R.
5 Saphir. Accordingly, the ALJ is required to provide "legitimate and
6 specific reasons" to reject Dr. Schwartz's assessment. *See Lester*, 81
7 F.3d at 830; *Orn*, 495 F.3d at 631.

8 First, the ALJ gave Dr. Schwartz's assessment little weight
9 because it was completed before Ms. Oliverrez's right knee replacement,
10 which improved her ability to stand and walk. AR 24. While it is true
11 the assessment was not completed before her second total knee
12 replacement, Dr. Schwartz had a significant treatment relationship
13 with Ms. Oliverrez. She saw him seven times over the course of 2012 and
14 2013, and he personally performed both of her total knee replacements.
15 See AR 416, 520-22. Dr. Schwartz expressly made his assessment in
16 anticipation of her second knee surgery and noted that it would be
17 scheduled within a year. AR 422. Moreover, as a specialist in
18 orthopedic surgery, Dr. Schwartz's medical opinion should be afforded
19 more weight than a generalist. See 20 C.F.R. § 404.1527(c)(5).
20 Considering these factors, the Court cannot find that the ALJ's first
21 reason to dismiss Dr. Schwartz's assessment was sufficiently specific
22 and legitimate.

23 Second, the ALJ gave Dr. Schwartz's assessment little weight
24 because he opined that Ms. Oliverrez would be eligible for Social
25 Security benefits. See AR 24-25, 422 ("The limitations inherent in
26 total knee replacement will give her permanent disability. . . . In my

1 opinion she would be eligible for Social Security disability.").
2 Although it is clear that the ALJ owed no deference to Dr. Schwartz's
3 opinions on issues "reserved to the Commissioner," such as the final
4 disability determination, 20 C.F.R. §§ 404.1527(d)(3), 416.972(d)(3),
5 it is less clear why the ALJ rejected his assessment entirely. The
6 Court finds this is not a specific and legitimate reason to reject Dr.
7 Schwartz's assessment.

8 Because the ALJ's opinion does not articulate the "specific and
9 legitimate reasons" required by the law of this Circuit, the ALJ
10 harmfully erred giving little weight to the medical opinion of Dr.
11 Schwartz.³ See *Lester*, 81 F.3d at 830; *Orn*, 495 F.3d at 631.
12 Accordingly, the Court remands for the ALJ to re-weight the medical
13 opinion of Dr. Schwartz.

14 3. Drs. H.C. Alexander III and J.R. Saphir

15 The ALJ also considered the opinions of non-examining physicians
16 Dr. Alexander, who telephonically appeared and testified at the
17 January 8, 2015 hearing, and Dr. Saphir, who assessed Ms. Oliverez's
18 medical records in April 2013. AR 24-25, 35. Ms. Oliverez contends the
19 ALJ erred by improperly awarding more weight to the testimony of non-
20 examining physicians Drs. Alexander and Saphir than examining
21 physicians Drs. Najera and Schwartz. ECF No. 13 at 14.

22 The ALJ awarded the opinion of Dr. Alexander "significant"
23 weight because he reviewed the entire longitudinal record, testified

24 _____
25 ³ The record may, in fact, provide the ALJ specific and legitimate reasons to
26 reject Dr. Schwartz's opinion - for example, when considered in light of Dr.
Saphir's and Dr. Alexander's assessments and Ms. Oliverez's testimony at the
hearing. However, this Court is limited to considering only those reasons
expressly given by the ALJ. See *Lester*, 81 F.3d at 830-32.

1 and was subject to cross examination at the hearing, was familiar with
2 Social Security regulations, and the consistency of his testimony with
3 the objective medical evidence. AR 24. The ALJ also awarded the
4 opinion of Dr. Saphir "great" weight because it is consistent with the
5 evidence showing Ms. Oliverez's condition improved and consistent with
6 the opinion of Dr. Alexander.

7 The Court finds these reasons convincing and holds that the
8 record provides substantial evidence to support the ALJ's credibility
9 determinations of Drs. Alexander and Saphir. See *Tonapetyan v. Halter*,
10 242 F.3d 1144, 1149 (9th Cir. 2001) (holding ALJ properly relied on
11 non-examining physician's opinion where it was based on objective
12 medical evidence). However, because the ALJ is instructed to re-weigh
13 Dr. Schwartz's opinion, he should re-evaluate the opinions of Drs.
14 Alexander and Saphir in light of any developments on remand.

15 **C. Lay testimony**

16 Ms. Oliverez also contends the ALJ improperly dismissed the lay
17 testimony of her daughter and sister. ECF No. 13 at 17-18. The ALJ
18 must give germane reasons to reject the testimony of lay witnesses.
19 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).

20 Here, the ALJ gave little weight to the lay testimony of Ms.
21 Oliverez's daughter and sister because they are not medically trained,
22 are not disinterested, and the statements are inconsistent with the
23 medical evidence. AR 25-26. Moreover, the ALJ noted that her sister's
24 opinion was less credible because she only saw Ms. Oliverez every few
25 weeks, and her daughter's statement was "very general" and not
26 helpful. AR 26.

1 Lay testimony may not be dismissed simply because of potential
2 bias or lack of medical training. See *Regennitter v. Comm'r of Soc.*
3 *Sec. Admin.*, 166 F.3d 1294, 1298 (9th Cir. 1999) ("[T]he fact that a
4 lay witness is a family member cannot be a ground for rejecting his or
5 her testimony."). Nonetheless, the ALJ provided sufficiently germane
6 reasons to discredit the aforementioned lay testimony. Accordingly,
7 the Court holds the ALJ did not err in giving little weight to the lay
8 witness testimony of Ms. Oliveres's daughter and sister.

9 Ms. Oliveres's testimony

10 Finally, Ms. Oliveres contends the ALJ committed reversible
11 error by discrediting her testimony regarding the intensity,
12 persistence, and limiting effects of her symptoms without a specific,
13 clear, and convincing reason. ECF No. 13 at 18. The Commissioner
14 responds that the ALJ's stated reasons are sufficiently specific,
15 clear, and convincing to reject Ms. Oliveres's testimony. ECF No. 26
16 at 5.

17 The ALJ found that Ms. Oliveres's medically determinable
18 impairments could reasonably cause her alleged symptoms but that her
19 statements regarding their intensity, persistence, and limiting
20 effects were not entirely credible. AR 23-24. To support this
21 conclusion, the ALJ cited her capacity for daily activities (e.g.,
22 completing household chores, laundry, pet care, cooking, shopping, and
23 crocheting), that her impairments existed prior to the onset date and
24 she previously engaged in substantial gainful activity in spite of
25 them, that her knee conditions had improved since the onset date, and
26

1 that the frequency and severity of her alleged symptoms were not
2 supported by the record evidence. AR 23.

3 An ALJ may only reject a claimant's testimony about the severity
4 of her symptoms by offering "specific, clear, and convincing reasons
5 for doing so." *Smolen*, 80 F.3d at 1281. "This is not an easy
6 requirement to meet: The clear and convincing standard is the most
7 demanding required in Social Security cases." *Garrison*, 759 F.3d at
8 1014 (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924
9 (9th Cir. 2002)).

10 Given that the Court is remanding this matter, in part, to re-
11 weigh the medical evidence, the Court need not rule on whether the ALJ
12 erred in rejecting Ms. Oliverrez's testimony.⁴ The ALJ is instructed to
13 re-evaluate Ms. Oliverrez's testimony in light of his new consideration
14 of the medical evidence. See *Smolen*, 80 F.3d at 1281 (emphasizing the
15 importance of objective medical evidence in weighing claimant's
16 testimony). The ALJ should only discredit Ms. Oliverrez's testimony
17 regarding the severity of her symptoms by citing specific, clear, and
18 convincing reasons.

19 **D. Credit-as-true rule**

20 Ms. Oliverrez requests that the Court remand to the Commissioner
21 for an immediate award of benefits. ECF No. 13 at 6. The Ninth Circuit
22 has employed the "credit-as-true rule," under which courts are free to

23 ⁴ The Court does note that the ALJ cited Ms. Oliverrez's daily activities as a
24 reason for discrediting her testimony. The Ninth Circuit has explained that a
25 capability to complete basic daily activities does not necessitate an adverse
26 credibility determination. See *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
1989) ("The Social Security Act does not require claimants be utterly
incapacitated to be eligible for benefits. . . ."); see also *Orn*, 495 F.3d at
639 (holding the ALJ must make specific findings that daily activities are
transferrable to the workplace to discredit a claimant's testimony).

1 reverse and remand with instructions to calculate and award benefits
2 if three conditions are met: (1) the record has been fully developed
3 and further administrative proceedings would serve no useful purpose;
4 (2) the ALJ has failed to provide legally sufficient reasons for
5 rejecting evidence; and (3) if the improperly discredited evidence
6 were credited as true, the ALJ would be required to find the claimant
7 disabled on remand. *See Varney v. Sec'y of Health & Human Servs.*, 859
8 F.2d 1396 (9th Cir. 1988); *Garrison*, 759 F.3d at 1020 (9th Cir. 2014).

9 Here, the Court is remanding to further develop the record. It
10 is therefore unclear whether the ALJ would be required to find Ms.
11 Oliveriez disabled on remand. Accordingly, the Court declines to remand
12 for the immediate award of benefits. *Id.*

13 VI. CONCLUSION

14 In summary, the Court finds the ALJ erred by failing to make
15 specific findings as to the physical and mental demands of Ms.
16 Oliveriez's past relevant work and by failing to provide specific and
17 legitimate reasons for discrediting the medical opinion of Dr. Paul
18 Schwartz. The Court remands this case for the ALJ to:

- 19 1. Make specific findings as to the physical and mental
20 demands of Ms. Oliveriez's past relevant work as actually or
21 generally performed;
- 22 2. Re-weigh the medical opinions of Drs. Schwartz, Alexander,
23 and Saphir. The ALJ shall provide sufficient reasons if he
24 rejects any of these opinions;

1 3. If helpful, the ALJ should conduct additional hearings and
2 receive additional evidence and testimony to further
3 develop the record; and

4 4. Re-evaluate the credibility of Ms. Oliverez's testimony in
5 light of the objective medical evidence.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
8 **GRANTED IN PART** and **DENIED IN PART**.

9 2. The Commissioner's Motion for Summary Judgment, **ECF No. 26**,
10 is **DENIED**.

11 3. This matter is **REMANDED** to the Commissioner for additional
12 proceedings consistent with this Order.

13 4. **JUDGMENT** is to be entered in favor of the Plaintiff.

14 5. Mr. Tree may file a separate motion to apply for attorneys
15 fees.

16 6. The case shall be **CLOSED**.

17 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
18 Order and provide copies to all counsel.

19 **DATED** this 29th day of September 2017.

20 s/Edward F. Shea

21 EDWARD F. SHEA

22 Senior United States District Judge